

Antitrust Compliance Program: an international challenge

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Early approach of the EU Commission and General Court

- Implementation of antitrust compliance programmes as a mitigating circumstance:

“ ...The undertakings concerned have adopted a comprehensive practical detailed and carefully considered antitrust compliance programme, with appropriate legal advice. Such action must be considered a positive step which contributes to an awareness at all levels of the group of the daily impact of competition policy. ...”
(Comm. Dec. 82/853/EEC National Panasonic; Comm. Dec. 85/79/EEC Deere; Comm. Dec. Toshiba 91/532/EEC; Comm. Dec. 92/426/EEC Parker Pen)

Change in the approach of the EU institutions: General Court

- No obligation to consider antitrust compliance programmes as a mitigating circumstance

“...whilst it is indeed important that the applicant took steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that circumstance does not alter the fact that an infringement has been found to have been committed ...” (Case T-7/89, Hercules Chemicals; Case T-53/03 BPB v Commission)

Change in the approach of the EU institutions: EU Commission (2)

“ ... the adoption of a compliance programme should not be considered as an attenuating circumstance justifying a reduction in the fine ...” (Comm. Dec. 2004/206/EC Flood flavour enhancers, Comm. Dec. 2002/742/EC Citric acid; Comm. Dec. 2003/2/EC Vitamins; Comm. Dec. 2003/675/EC PO Video Games, PO Nintendo Distribution, Omega-Nintendo)

Compliance Matters: The EU Commission Brochure 2011

General obligation to comply/benefits

➤ Effectiveness → non-violation

➤ Steps

↳ risk assessment

↳ informing and training of the employees

↳ updating and monitoring

Compliance Matters: The EU Commission Brochure 2011 (2)

Beneficial consequences

- full effectiveness → non-violation
- insufficiency → minimise company's exposure
(end of the infringement, leniency)

Compliance Matters: The EU Commission Brochure 2011 (3)

Compliance strategy failure

“... the mere existence of a compliance programme will not be considered an attenuating circumstance. Nor will the setting-up of a compliance programme be considered as a valid argument justifying a reduction of the fine in the wake of investigation of an infringement ...”

“... the existence of a compliance programme will not be considered an aggravating circumstance if an infringement is found by the enforcement authorities ...”

**IS THIS ENOUGH IN ORDER TO ENCOURAGE ANTITRUST COMPLIANCE
POLICY**

?

Competition Compliance Programs

Intesa Sanpaolo's experience

Content – Main elements

1. An **EU Competition Compliance Policy** adopted by ISP on 2009
2. A **permanent working group – the Antitrust Team** – at parent company's level composed by antitrust specialists
3. **Training programs**

The ISP's Antitrust Compliance Program has been **launched in 2006** following the merger between Banca Intesa e Sanpaolo IMI and **homogeneously implemented worldwide** by all ISP Group subsidiaries (any company whose activities affect the EU market is subject to European competition law)

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1. EU Competition Compliance Policy

Three main sections

1. Antitrust rules

- Prohibited agreements (art. 101 Treaty)
- Abuse of dominant position (art. 102 Treaty)
- Concentrations between undertakings (EC Regulation no. 139/2004)

2. Compliance to competition rules

- Why bother with competition rules (consequences of non compliance and positive advantages of the antitrust compliance program)
- To do's and not to do's (assessing the risk, typical examples of prohibited agreements, recommendations)

3. Preventive measures and company procedures

- Inspections (what to do during and after the inspections)
- Privilege (rules of privilege)
- Document retention (including electronic records)

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2. The Antitrust Team

- is a working group composed by **antitrust specialists** belonging to the International Regulatory and Antitrust Affairs Unit. Depending on the different areas of responsibility and the implications of business, representatives of other Divisions may also participate;
- conducts regular **due diligence on the Group's activities** and holds **interviews** with personnel in various departments; and
- is equipped with the **necessary expertise** to help identify specific areas of concern and to advise on how to deal with potential competition issues arising from any activities and initiatives;
- Organizes and handles **training programs** for the top management and targeted personnel.

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3. Training Programs

The aim of the training programs handled by the antitrust team is **to continue to promote the knowledge of and the compliance to the antitrust and competition legal framework**. In order to fulfill this goal, the antitrust team has implemented different kind of trainings:

- **E-learning courses:** the e-learning courses, prepared by the Antitrust Team, have been implemented by all the banks belonging to the ISP group worldwide.
- **Classrooms:** the courses are carried out by the Antitrust Team for the top management and for the personnel that potentially is able to realize anticompetitive behaviors.
- **Web TV and newsletters:** the Antitrust Team informs the company - on a weekly basis - of the main important news concerning the antitrust and competition matters by means of newsletters and WebTV channel available at Group level.

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Key points

- ✓ full compliance to antitrust rules is essential;
- ✓ **all employees** at any level may commit antitrust violations;
- ✓ endorsement by and commitment of the **top management**;
- ✓ **homogeneous implementation** at Group level;
- ✓ based on **EU and national competition law**;
- ✓ the benefits of antitrust compliance **motivate employees** to be an active and positive party;
- ✓ the Antitrust Team is available to help, **not to evaluate or judge** the behavior of the employees;
- ✓ the Antitrust Team can **be easily contacted** via a dedicated e-mail address and direct line.

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Expected outcome

- ❖ **Preventing violations:** educated employees are less likely to commit infringements, become aware of the anti-competitive nature of their competitors' activities and, if necessary, learn how to take distance from the behavior of other companies.
- ❖ **Mitigating damage:** the Policy is an early warning system to discover violations at an early stage.
- ❖ **Improvement of competitiveness:** carefully planned, lawful and legitimate behavior will lead to better business and, therefore, to higher profits.
- ❖ **Demonstration of commitment to compliance:** possible recognition by competition authorities of our commitment to antitrust compliance - this resulting in better reputation, less strict scrutiny, possible mitigation of fines.

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The debate

Do Authorities care about businesses' investments in compliance?

Joaquìn Almunia (Bruxelles, June 9th 2011)

«La Commission soutient et promeut l'adoption des programmes de conformité par les entreprises.»

Nevertheless...

Selon la pratique décisionnelle de la Commission, toutefois, les mesures de conformité ne sauraient influencer sur la sanction des pratiques passées, surtout s'agissant de cartels [...]. Cette pratique a été confirmée à plusieurs reprises par la jurisprudence européenne»

The European Commission has taken a neutral position on compliance programs, not able to mitigate or aggravate responsibility

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The debate – France

- The French Autorité de la Concurrence introduced on February 10th, 2012 a new draft guidelines regarding antitrust compliance programs
- The document sheds light on the added value of having a corporate compliance program in place, provided that it is both powerful and effective. Not only do such programs play a preventive and educational role, but they can also be a key asset in helping the company's board to detect antitrust offenses and to deal with them, in particular by swiftly submitting a leniency application to the Autorité de la Concurrence. The French Competition Authority is bound by the provisions of this document.
- The framework document explains **how to create a credible and effective compliance program**, and **how the Autorité de la Concurrence will take such programs into account** when dealing with individual cases of anticompetitive agreements between companies or cases of abuses of dominant position.

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The debate – France

The Authority has recommended five key actions to develop an efficient program:

- Define a **clear, formal, and public position of support** to be adopted by the company's management bodies
- Appoint one or more **persons responsible** for developing and operating the program
- **Inform, train, and develop the awareness** of staff
- Set up **internal control, audit, and whistle-blowing procedures**
- Establish a **system for reviewing reports on misconduct and taking relevant actions**

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The debate – France

What is the result?

The Autorité highlighted that Programs are valuable tools for **preventing** and **reducing risks**

However

The Autorité underlined that there is no reason to treat a compliance program as a mitigating circumstance, indeed:

- The Autorité will, in cases other than cartels, take compliance programs into account as a mitigating factor only when companies with compliance programs discover and put an end to anticompetitive practices, on their own initiative, before any investigation or procedure is brought by a competition authority with regard to the said infringement.
- If a settlement procedure is running before the Autorité, companies that do not have but would like to set up a compliance program or companies which would like to improve an existing program by implementing the good practices recommended by the Autorité can benefit from a reduction of fines of 10%.

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The debate – France

ISP's Position

- **ISP considers that an automatic recognition as a mitigating factor (in terms of fines' reduction) could have the positive effect to encourage companies to invest more in programs, in prevention and in spreading the antitrust compliance culture that would be definitely beneficial to competitors, final consumers and market.**
- **ISP considers also that the automatic recognition as a mitigating factor (in terms of fines' reduction) could have the positive effect to allow businesses to better handle and supervise compliance with antitrust laws at group level given the existence of a presumption of responsibility of the parent company for the anticompetitive behavior put in place by own controlled companies**

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Conclusion

ISP's Position

Considering that the implementation of Antitrust Compliance Programs is now taken into account by different important NCAs (OFT in the UK, Autorité de la Concurrence in France, Bureau de la concurrence in Canada, Swiss Competition Commission), the European Commission and other NCAs should also support companies in their efforts to develop a competition culture taking the existence of compliance programs into due account

Grazie per l'attenzione!